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What I tell you three times is true:¹ lawful residence and equal treatment after *Dano*

Niamh Nic Shuibhne²

1. Introduction

The Grand Chamber of the Court of Justice delivered its judgment in *Dano* on 11 November 2014.³ Its finding that a Member State is not precluded from excluding nationals of other Member States from entitlement to social assistance when they do not have a right to reside there raised two significant questions. First, the concept of lawful residence – essential for the purposes of claiming a right to equal treatment with host State nationals – was tied firmly in this judgment to the conditions established by Article 7(1) of Directive 2004/38/EC.⁴ But it was not therefore clear whether an EU citizen residing lawfully on another basis – whether, for example, based on national law⁵ or EU law⁶ – could still ground a right to equal treatment in primary EU law (Articles 18 and 21 TFEU). Second, while the Court confirmed that an individual assessment of the financial circumstances of the claimant should be undertaken to establish as a question of fact whether or not he or she possessed sufficient resources to satisfy the requirement of ‘sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence’ codified in Article 7(1)(b) of the Directive,⁷ a proportionality-driven assessment of the impact of exclusion from entitlement in each claimant’s particular case was not required.⁸ Might other ‘categories’ of claimants be therefore similarly and legitimately excluded from entitlement under national legislation or was the *Dano* rationale instead tied inherently

¹ “Just the place for a Snark!” the Bellman cried,
As he landed his crew with care;
Supporting each man on the top of the tide
By a finger entwined in his hair.
“Just the place for a Snark! I have said it twice:
That alone should encourage the crew.
Just the place for a Snark! I have said it thrice:
What I tell you three times is true” (L Carroll, ‘The Hunting of the Snark’).

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³ Case C-333/13 *Dano*, EU:C:2014:2358.

⁴ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L158/77; *Dano*, paras 73-74. Article 7(1) of the Directive outlines three ways in which lawful residence in a host State can be established: as a worker or self-employed person; by having sufficient resources not to become a burden on the social assistance system and also comprehensive sickness insurance cover there; or as a student (fulfilling sufficient resources and medical insurance criteria).

⁵ E.g. Case C-85/96 *Martínez Sala*, EU:C:1998:217.

⁶ E.g. Case C-480/08 *Teixeira*, EU:C:2010:83.

⁷ *Dano*, para. 80.

⁸ Contrary to the position in previous case law e.g. Case C-413/99 *Baumbast*, EU:C:2002:493, paras 91-93.

to the interest of ‘prevent[ing] economically inactive Union citizens from using the host Member State’s welfare system to fund their means of subsistence’, noting that it was also established as a matter of fact by the referring court in that case that the claimant was ‘not seeking employment and that she did not enter Germany in order to work’?⁹

The judgment in *Dano* provoked ‘an unusual stir’¹⁰ that questioned the intended scope of the Court’s reasoning and the implications of its choices.¹¹ However, a clearer understanding of ‘social assistance’ – a crucial term used in several provisions of Directive 2004/38 – was established, since the Court repeated the definition that it had recently provided in *Brey* i.e. ‘all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State’.¹² Importantly, the Court seemed to suggest that the exclusions from entitlement to social assistance provided for in Directive 2004/38 worked not just in parallel with but *above* the system developed for coordination of social security under Regulation 883/2004.¹³ Additionally, in an earlier line of case law, it distinguished ‘[b]enefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market’.¹⁴ EU citizens seeking work in a host State could not be excluded from entitlement to this type of benefit even though Article 24(2) of the Directive explicitly excluded them from entitlement to social assistance. However, the difference between both types of benefit in substance had not been determined.

In a relatively short timeframe, the Court had the opportunity to add three further links to this particular ‘judicial chain’¹⁵ – *Alimanovic*,¹⁶ *Garcia-Nieto*,¹⁷ and *Commission v UK*.¹⁸ Fundamentally, questions about which EU citizens should be

⁹*Dano*, paras 76 and 66 respectively.

¹⁰AG Wathelet in *Alimanovic* (EU:C:2015:210), para. 4 of the Opinion.

¹¹For an overview of relevant interpretative possibilities, see H Verschueren ‘Preventing benefit tourism in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?’ (2015) 52:2 CML Rev 363.

¹²*Dano*, para. 63, citing Case C-140/12 *Brey*, EU:C:2013:565, para. 61. See also, recitals 10, 16 and 21 of the preamble and Articles 7, 8, 12, 13, 14 and 24 of Directive 2004/38.

¹³*Dano*, paras 63-64: ‘It must be stated first of all that “special non-contributory cash benefits” as referred to in Article 70(2) of Regulation No 883/2004 do fall within the concept of “social assistance” within the meaning of Article 24(2) of Directive 2004/38... That having been said... Article 24(2) of that directive contains a derogation from the principle of non-discrimination’. Regulation 883/2004/EC on the coordination of social security systems, OJ 2004 L166/1.

¹⁴Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344, para. 45.

¹⁵A Iliopoulou-Penot, ‘Deconstructing the former edifice of Union citizenship? The *Alimanovic* judgment’ (2016) 53:4 Common Market Law Review 1007 at 1008.

¹⁶Case C-67/14, EU:C:2015:597 (judgment of 15 September 2015).

¹⁷Case C-299/14, EU:C:2016:114 (judgment of 25 February 2016).

¹⁸Case C-308/14, EU:C:2016:436 (judgment of 14 June 2016).

supported in host States, to what extent, and for how long are necessary to ask. As questions of policy, they have become fused with broader uncertainties about the worth of extending solidarity beyond State borders, and with broader debates on migration that are too often conducted in a toxic haze. As questions of law, they are less worked through than they need to be.

Reflecting on the recent case law developments, this comment seeks primarily to contribute to debates about a concern for quality of law – the quality of EU citizenship and free movement law in a substantive sense; but also about how EU law is made, applied and revised. It examines the implications of *Alimanovic*, *Garcia-Nieto* and *Commission v UK* for the different kinds of citizen-claimants involved in each case – the findings of which concern those looking for work, those who have worked previously but no longer do, and those who need to rely on Article 7(1)(b) to establish lawful residence in the host State. It also reflects – somewhat less abstractly that might have been the case before the recent Brexit shock and the European Council negotiations that preceded it – on the rules that apply to those who have moved to another State and *are* working or self-employed there. Ironically, while the commitment to equal treatment for EU workers in host States undoubtedly influenced the permissive legal foundations of EU citizenship law, limits restraining the latter may now be feeding back to revised thinking about the former.

2. The cases

2.1 *Alimanovic*

Ms Alimanovic and her three children are Swedish nationals though the children were born in Germany in the 1990s. The family left Germany in 1999 but re-entered in 2010. For less than one year i.e. from June 2010 until May 2011, Ms Alimanovic and her eldest daughter both worked in short-term positions. From 1 December 2011, when they were neither working nor self-employed, they received non-contributory subsistence benefits as beneficiaries fit for work under the applicable national rules; Ms Alimanovic also received non-contributory subsistence benefits for her two younger children. However, payment of all benefits was suspended after 31 May 2012. The referring court regarded Ms Alimanovic and her eldest daughter as jobseekers, meaning that their entitlement to subsistence benefits was precluded under the applicable national rules even though home State nationals would be entitled to the benefits in question in the same circumstances.¹⁹ AG Wathelet framed the legal problem raised by the case as ‘sensitive in human and legal terms. It will necessarily lead to the Court ruling both on the protection offered by EU law to its citizens, as regards their financial situation and their dignity too, and on the current scope of the fundamental right to free movement, a founding principle on which the European Union is built’.²⁰

The first question concerned the nature of the benefits at issue. Neither the definition of social assistance nor its legal autonomy vis-à-vis Regulation 883/2004 as

¹⁹*Alimanovic*, paras 34 and 40.

²⁰AG Wathelet in *Alimanovic*, para. 2 of the Opinion.

established in *Brey* and confirmed in *Dano* had revealed whether or how the concept overlapped with benefits ‘intended to facilitate access to the labour market’ – which fall outside the scope of the derogation from equal treatment prescribed by Article 24(2) of Directive 2004/38 and which must, in consequence, be granted to jobseekers from other Member States when granted to home State nationals as a matter of equal treatment. The Court adopted the reasoning of AG Wathelet on this point, guiding the referring court towards examining the ‘*predominant* function of the benefits at issue’ – if that is found ‘in fact to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity [then] those benefits cannot be characterised as benefits of a financial nature which are intended to facilitate access to the labour market of a Member State [but] must be regarded as “social assistance” within the meaning of Article 24(2) of Directive 2004/38’.²¹

Second, confirming *Dano*, the Court reiterated that entitlement to social assistance on the premise of equal treatment requires that the claimant’s ‘residence in the territory of the host Member State complies with the conditions of Directive 2004/38’.²² On the facts of the present case, the Court examined whether Ms Alimanovic and/or her eldest daughter could establish residence on the basis of either Article 7(3) or Article 14(4)(b) of the Directive. Article 7(3) set out when Union citizens who are no longer working or self-employed can retain that status and thereby a claim to lawful residence under Article 7(1)(a). But Article 7(3)(b) requires that the citizen has worked for more than one year, ruling out, just, its relevance for the claimants in this case. Article 7(3)(c) states that citizens who had worked for less than one year retain worker status for six months – precisely the point at which payment of subsistence benefits was suspended in this case.

Article 14(4)(b) provides that an expulsion measure may not be adopted against a Union citizen or their family members where the Union citizen ‘entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged’.²³ The Court confirmed that Ms Alimanovic and her eldest daughter could establish a right to reside in Germany on that basis, and therefore come within the scope of equal treatment to social assistance in principle.²⁴ However, ‘[i]t follows from the express reference in Article 24(2) of Directive 2004/38 to Article 14(4)(b) thereof that the host Member State may refuse to grant any social assistance to a Union citizen whose right of residence is based solely on that latter provision’.²⁵

Finally, the Court addressed the ambiguity remaining after *Dano* about when a host State should (or need not) undertake assessments of individual circumstances, finding that ‘although the Court has held that Directive 2004/38 requires a Member

²¹*Alimanovic*, paras 45-46 (emphasis added); referring to paras 66-71 of the Opinion of AG Wathelet.

²²*Alimanovic*, para. 49; citing *Dano*, para. 69.

²³The test in this provision draws from the judgment in *Antonissen*, where the Court connected residence rights for jobseekers to Article 45 TFEU (Case C-292/89, EU:C:1991:80).

²⁴*Alimanovic*, para. 57.

²⁵*Alimanovic*, para. 58.

State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system...no such individual assessment is necessary in circumstances such as those at issue in the main proceedings'.²⁶

2.2 *Garcia-Nieto*

The key differences between *Alimanovic* and *Garcia-Nieto* are that, in the latter case, the claimants were first-time jobseekers and the disputed entitlement to non-contributory subsistence benefits concerned the first three months of residence. Ms Garcia-Nieto is a Spanish national who moved to Germany with her daughter in April 2012. She registered as a jobseeker on 1 June and began work as a kitchen assistant soon afterwards, receiving a salary from 1 July. Her partner, Mr Peña Cuevas, and his son arrived on 23 June, all four living initially with Ms Garcia-Nieto's mother. On 30 July, the family applied for subsistence benefits – these were granted with the exception of benefits for Mr Peña Cuevas and his son for August and September, neither of whom were 'family members' of Ms Garcia-Nieto within the meaning of Article 2(2) of the Directive.²⁷ National rules excluded Mr Peña Cuevas from entitlement to the benefits on the basis that he had resided in Germany for less than three months and was neither a worker nor self-employed at that time.

Unsurprisingly, the Court repeated the main findings from *Alimanovic*—here, lawful residence was connected to Article 6(1) of Directive 2004/38²⁸ while, again, the explicit derogation from equal treatment was found in Article 24(2) ('the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence'). On the question of individual assessment, the Court remarked that 'if such an assessment is not necessary in the case of a citizen seeking employment who no longer has the status of "worker", the same applies *a fortiori* to persons who are in a situation such as that of Mr Peña Cuevas'.²⁹ Further distinguishing citizens who carry out economic activity in the host State, and addressing the relationship between Directive 2004/38 and Regulation 883/2004, the Court concluded that 'there is nothing to prevent such benefits being refused to nationals of other Member States who do not have the status of workers or self-employed persons or persons who retain such status during the first three months of residence in the host Member State'.³⁰ But what actually prevents – or conversely might not prevent – such refusal for workers or self-employed persons is returned to in Section 3.2.2 below.

2.3. *Commission v UK*

²⁶*Alimanovic*, para. 59; citing *Brey*, paras 64, 69 and 78.

²⁷Ms Garcia-Nieto and Mr Peña Cuevas were not married and therefore not 'spouses' per Article 2(2); his son was not therefore the direct descendant of Ms Garcia-Nieto's spouse.

²⁸ *Garcia-Nieto*, para. 41. Article 6(1) of the Directive provides that 'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport'.

²⁹*Garcia-Nieto*, para. 48.

³⁰*Garcia-Nieto*, para. 51; citing *Brey*, para. 44 and *Dano*, para. 83.

The pre-litigation procedure that led to these proceedings commenced in 2008, based on ‘numerous complaints from nationals of other Member States resident in the United Kingdom that the competent United Kingdom authorities had refused to grant them certain social benefits on the ground that they did not have a right to reside in that Member State’.³¹

The Commission refined the scope of its action to focus on conditions regulating the payment of child benefit and child tax credit, and to challenge the compatibility with EU equal treatment obligations of the requirement in national rules that a person claiming these benefits had satisfy a right to reside test. Regulation 883/2004 establishes a ‘habitual residence’ test for the payment of social security benefits; through criteria developed further in legislation and in case law, this is a factual ‘centre of interests’ test, the purpose of which is to determine the Member State of responsibility in the complicated mission of social security coordination.³² Additionally, Article 4 of the Regulation provides that ‘[u]nless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof’. The Commission argued that by requiring a right to reside – lawful residence – for persons claiming child benefit and child tax credit, UK rules add a condition not provided for in Regulation 883/2004. In its view, determination of habitual residence ‘cannot be influenced by the provisions of Article 7 of Directive 2004/38’.³³ Alternatively, the Commission contended that the lawful residence condition ‘results in direct, or at least indirect, discrimination, prohibited by Article 4 of Regulation No 883/2004’.³⁴

The legal context of this case differs from the case law on legal residence that preceded it in one significant respect. In *Brey*, *Dano*, *Alimanovic* and *Garcia-Nieto*, the benefits in question were classified as special non-contributory benefits. The Court recognised that these benefits were provided for in Regulation 883/2004 but it super-imposed its definition of social assistance for the purposes of Directive 2004/38 over that legal framework. However, in *Commission v UK*, as confirmed by the Court, the two benefits in question ‘have the objective of helping to cover family expenses and are funded not from recipients’ contributions but from compulsory taxation’; according to established case law, ‘benefits which are granted automatically to families that meet certain objective criteria relating in particular to their size, income and capital resources, without any individual and discretionary assessment of personal

³¹*Commission v UK*, para. 21.

³²See Regulation (EC) 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L284/1); and Case C-90/97 *Swaddling*, EU:C:1999:96, para. 29.

³³AG Cruz Villalón in *Commission v UK* (EU:C:2015:666), para. 21 of the Opinion; in the same paragraph, the Advocate General notes the Commission’s caution against a result in which application of the UK right to reside test could mean that ‘no Member State will be obliged to pay certain family allowances to the persons concerned, despite the fact that the latter live in a Member State and have dependent children’. The facts in *Dano* provide a useful illustration of when that might be the case.

³⁴*Commission v UK*, para. 74.

needs, and which are intended to meet family expenses must be regarded as social security benefits'³⁵ – i.e. they are not also classifiable as social assistance benefits in the *Brey*-etc understanding of that term. In fact, the families in *Dano*, *Alimanovic* and *Garcia-Nieto* all received comparable child benefits in Germany and this was not contested in any of the three cases by the competent national authorities.

Addressing the first part of the Commission's argument, the Court disagreed that Regulation 883/2004 must be the sole source of conditions determining eligibility for social security benefits. The Court accepted that the Regulation 'is intended not only to prevent the concurrent application of a number of national legislative systems to a given situation and the complications which may ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them'.³⁶ However, it also found that the relevant provision of the Regulation 'is not intended to lay down the conditions creating the right to social security benefits', meaning that '[i]t is in principle for the legislation of each Member State to lay down those conditions'.³⁷ Since the Regulation is all about the coordination of national social security schemes, the Court inferred that the measure 'thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law'.³⁸

Without any discussion of the fact that the benefits at issue are not social assistance benefits,³⁹ the Court then cited *Brey* and *Dano* to conclude that 'there is nothing to prevent, in principle, the grant of social benefits to Union citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State'.⁴⁰ However, inserting the Directive's tiers of citizenship, which are premised on degree of economic activity undertaken (or not), into the Regulation has been strongly criticised.⁴¹ Using the Directive to override the scope of the Regulation also calls into question the reasoning applied in cases such as *Teixeira*, which are premised precisely on a separation between the personal scope (Directive) and material scope (Regulation 492/1011) of claims about entitlement to benefits.⁴² And it raises questions about how

³⁵*Commission v UK*, paras 55 and 60; see also, AG Cruz Villalón, para. 46 of the Opinion.

³⁶*Commission v UK*, para. 64.

³⁷*Commission v UK*, para. 65; citing *Brey*, para. 41 and *Dano*, para. 89.

³⁸*Commission v UK*, para. 67.

³⁹Cf. AG Cruz Villalón, para. 64 of the Opinion; this question is returned to in more detail in Section 3.2.1 below.

⁴⁰*Commission v UK*, para. 68.

⁴¹E.g. M Cousins "'The baseless fabric of this vision": EU citizenship, the right to reside and EU law' (2016) 23(2) *Journal of Social Security Law* 89 at 104: 'The reference to economically inactive persons makes sense in the context of Directive 2004/38 if one assumes that it is a shorthand for persons who do not have a right to reside as workers (and/or perhaps as jobseekers). However, it makes no sense at all in the context of Regulation 883/2004 which has its own different scope *ratione personae*'.

⁴²*Teixeira*, para. 59: 'if Article [10] of Regulation [492/2011] were to be interpreted as being limited, since the entry into force of Directive 2004/38, to conferring the right to equal treatment with regard to access to education without providing for any right of residence for

much further the reach of the Directive might penetrate into other dimensions of material scope – including claims made by those working or self-employed in a host State, returned to in Section 3.2 below.

Meanwhile, in *Commission v UK*, the Court disagreed with the Commission's argument that the right to reside test distorted the Regulation's habitual residence test; it is instead 'a substantive condition which economically inactive persons must meet in order to be eligible for the social benefits at issue'.⁴³ However, that finding does bridge to the Commission's alternative argument, since the Court accepted that 'a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at a particular disadvantage'.⁴⁴ Turning then to the question of justification, the Commission had accepted that 'a Member State may wish to ensure that there is a genuine link between the person claiming the benefit and the competent Member State' – however, for social security benefits, it restated that 'it is Regulation No 883/2004 itself which establishes the means of testing whether such a genuine link exists (in this particular case, by applying the habitual residence criterion), and the Member States may make no changes to its provisions and add no supplementary conditions'.⁴⁵ But the Court's position on justification follows on from its leniency on that very question, concluding that 'the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State'.⁴⁶

Finally, in its evaluation of the proportionality of the condition, the Court agreed with the Advocate General that verification of lawful residence invokes Article 14(2) of the Directive, which provides: '[i]n specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically'. The Court was satisfied that UK procedures complied with these criteria, finding that 'the checking of compliance with the conditions laid down by Directive 2004/38 for existence of a right of residence is not carried out systematically and consequently is not contrary to the requirements of Article 14(2) of the directive. It is only in the event of doubt that the United Kingdom authorities effect the verification necessary to determine whether the claimant satisfies the conditions laid down by Directive 2004/38, in particular those

the children of migrant workers, maintaining it would appear superfluous after the entry into force of that directive'. Regulation 492/2011 on freedom of movement for workers within the Union, OJ 2011 L141/1.

⁴³*Commission v UK*, para. 72.

⁴⁴*Commisison v UK*, para. 77; citing Case C-73/08 *Bressol*, EU:C:2010:181, para. 41. The question of whether the discrimination at issue was direct or indirect is considered further in Section 3.1.1 below.

⁴⁵AG Cruz Villalón in *Commission vUK*, para. 24 of the Opinion.

⁴⁶*Commission v UK*, para. 80; citing case law incl. *Brey*, para. 61 and *Dano*, para. 63.

set out in Article 7, and, therefore, whether he has a right to reside lawfully in United Kingdom territory, for the purposes of the directive'.⁴⁷

3. Comment

Alimanovic, *Garcia-Nieto* and *Commission v UK* entrench the basic *Dano* position on equal treatment for EU citizens: their right not to be discriminated against in a host State connects to Article 24(1) of Directive 2004/38, which is conditioned by a right to reside in that State, which is in turn conditioned by other relevant provisions of the Directive. It therefore seems far less likely that an applicant residing lawfully in a host State solely under national law (*Martínez Sala*) or another stream of EU law (*Teixeira*) could now succeed in an equal treatment claim – for '[t]he palette of [Directive-compliant] situations is clearly more restrained than that of situations coming "within the scope of application of the Treaties" which trigger the application of Article 18 TFEU'.⁴⁸ The conditions established in the Directive are thus conferred with legal but also normative eminence in citizenship law, the implications of which will now be examined in more detail. The discussion first looks in more detail at how the fundamental free movement premises of discrimination, justification and proportionality played out in the recent case law. The relationship between the Directive and other sources of EU law – both primary and secondary – is then considered.

3.1 Lawful residence, equal treatment and Directive 2004/38

3.1.1 *The nature of the discrimination*

All three cases concerned differential treatment between home and host State nationals, but *Commission v UK* raised an interesting question about the *nature* of discriminatory treatment concerning EU nationals. In Section 2.3, we saw that 'the Commission contended that the lawful residence condition 'results in *direct, or at least indirect*, discrimination, prohibited by Article 4 of Regulation No 883/2004'.⁴⁹ The Court considered that the contested national condition amounted to indirect discrimination, since it is 'intrinsically liable to affect nationals of other Member States more than nationals of the host State and there is a consequent risk that it will place the former at

⁴⁷*Commission v UK*, para. 84.

⁴⁸Iliopoulou-Penot, n15 above, 1016. See further on the relationship between Article 24 of the Directive and Article 18 TFEU, N Nic Shuibhne 'Limits rising, duties ascending: the changing legal shape of Union citizenship' (2015) 52:5 CMLRev 889 at 909-911. In *Alimanovic*, AG Wathelet did consider briefly (at paras 117-122 of the Opinion) whether Ms Alimanovic's younger children may have residence rights under Article 10 of Regulation 492/2011 as the children of a former worker and to complete their education, which, as we know from *Teixeira*, did not attract the Directive's right to reside conditions to be satisfied in order to raise an equal treatment claim in the context of social benefits. As a source of residence rights, however, the Regulation continues to be invoked: see Case C-115/15 NA, EU:C:2016:487.

⁴⁹*Commission v UK*, para. 74 (emphasis added).

a particular disadvantage'.⁵⁰ But what did the Commission try to argue in terms of direct discrimination, and why? In essence: 'that the right to reside test constitutes direct discrimination based on nationality, given that it involves a condition that applies only to foreign nationals because United Kingdom nationals who are resident in the United Kingdom satisfy it automatically'.⁵¹

The Commission referenced the Opinion of AG Sharpston in *Bressol* to support this part of its claim. In that case, the Advocate General raised for debate the sometimes obscure dividing line between direct and indirect discrimination –drawing from case law on sex discrimination, she considered not just criteria explicitly framed as such, but also '*necessarily linked to a characteristic indissociable from sex*'.⁵² By analogy, 'discrimination can be considered to be direct where the difference in treatment is based on a criterion which is either explicitly that of nationality or necessarily linked to a characteristic indissociable from nationality'.⁵³ The right to reside condition contested in *Commission v UK* clearly meets that test 'because UK nationals resident in the United Kingdom automatically fulfil it'.⁵⁴ O'Brien presents the reality here very clearly: 'UK nationals do not "more easily satisfy" the test; they do not "more often than not" satisfy the test – they *always* and *automatically* satisfy the test and so are excused from meeting the condition. Only EU nationals must provide evidence of a right to reside. Only EU nationals can be excluded from entitlement due to economic inactivity'.⁵⁵ However, despite having emphasised the need to distinguish the right to reside condition in the national rules from the habitual residence criterion in Regulation 883/2004, the Court in fact blended the two once again in its reasoning on this point, finding that the UK rules generate unequal treatment between UK nationals and nationals of other States since 'such a residence condition is more easily satisfied by United Kingdom nationals, who more often than not are habitually resident in the United Kingdom, than by nationals of other Member States, whose residence, by contrast, is generally in a Member State other than the United Kingdom'.⁵⁶

AG Cruz Villalón articulated the crux of the dilemma when he noted that 'difference in treatment as regards the right of residence is inherent in the system and, to a certain extent, inevitable: by definition, a national of a Member State cannot be denied a right of residence in that State'.⁵⁷ The 'system' that can be inferred here is that established by Directive 2004/38; since the Advocate General went on to reference the *unequal* treatment that Article 24(2) of this measure allows for in the context of social assistance. But EU free movement law does still place (legal) value on distinguishing between different kinds of unequal treatment. In *Bressol*, AG Sharpston argued in essence that some rules, in their effects, are as close to direct discrimination as you can

⁵⁰*Commission v UK*, para. 77.

⁵¹*Commission v UK*, para. 35.

⁵²AG Sharpston in *Bressol* (EU:C:2009:396), para. 52 of the Opinion (emphasis in original).

⁵³AG Sharpston in *Bressol* (EU:C:2009:396), para. 53 of the Opinion.

⁵⁴AG Cruz Villalón in *Commission v UK*, para. 22 of the Opinion; see similarly, para. 35 of the judgment and Section 2 of the Immigration Act 1971.

⁵⁵C O'Brien 'The ECJ sacrifices EU citizenship in vain: *Commission v UK*' (2016) 53 CML Rev (forthcoming); emphasis in original.

⁵⁶*Commission v UK*, para. 78.

⁵⁷AG Cruz Villalón in *Commission v UK*, para. 75 of the Opinion.

get without labelling it as such explicitly. In that case and in *Commission v UK*, the Court declined to transpose to free movement law the more nuanced template applied in sex discrimination law, which allows for this kind of complexity to be recognised. By citing its judgment, and not the Opinion, in *Bressol*, the Court opted without further discussion for the less severe outcome – less severe in the sense that the main legal consequence that flows from classification as indirect discrimination concerns the open-ended range of public interests that a State can then seek to defend.

3.1.2 *Justification and proportionality*

In the judgment in *Commission v UK* –and since the defendant State was not confined to the limited Treaty grounds on which direct discrimination might be forgiven –the Court ruled that ‘the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State’.⁵⁸

The line of case law it then cited in support of this point shows the low-key yet profoundly significant evolution of how the public finance defence has been handled in free movement law –tracing the Court’s own references: from the citizen-centred argument that since ‘beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State. Directive 93/96...thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary’ in *Grzelczyk* (para. 44); to the more generalised version of that principle in *Bidar*, which, notably, also shifted the expression of it more to the interests of the State (‘although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States...it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State’);⁵⁹ to now featuring in the definition of social assistance per se in *Brey* (para. 61) and *Dano* (para. 63) – ‘to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State’.

In *Alimanovic*, the Court reiterated the related point from *Dano* that it is a stated objective of Directive 2004/38 to ‘[prevent] Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system

⁵⁸*Commission v UK*, para. 80.

⁵⁹Case C-209/03 *Bidar* EU:C:2005:169, para. 56.

of the host Member State'.⁶⁰ It is widely observed that this approach subdues other objectives also plainly articulated in the preamble⁶¹ as well as recalibrating, more generally, the diminution of solidarity borders that was either (depending on your view of the progress of integration) reflected or more consciously attempted by the Court in *Grzelczyk*.⁶² The line between apparently forbidden justification grounds based on purely economic reasons, on the one hand, and permitted justification grounds expressed in the language of public finance yet protecting broader aims and activities, on the other, is a difficult one to draw.⁶³ However, in the reactions to date to *Alimanovic* and *Commission v UK*, the more practical dimension of demonstrating the problem for public finances has attracted particular criticism. Two related issues stand out in this context – the softness of proportionality scrutiny that results from the confirmed move to systemic impact rather than individual circumstances assessment; and the prevalence of presumptions over proof.

In Section 2.1, we saw that the Court expressly ruled out in *Alimanovic* the need for an assessment of the individual burden placed on the defendant State's welfare system. AG Wathelet had presented an alternative argument. While acknowledging that the 'loss of the status of worker seems to be an appropriate, albeit restrictive, transposition of Article 7(3)(c) of Directive 2004/38', he then considered that 'its automatic consequences for entitlement to subsistence benefits under SGB II seem to go beyond the general system established by that directive'.⁶⁴ On that basis, and in a 'remarkable effort to fit the reasoning in *Dano* with the findings in judgments predating it',⁶⁵ he suggested that 'it is important that the competent authorities of the host Member State, when examining the application of a Union citizen, economically inactive and in a situation like that of Ms Alimanovic and her daughter Sonita, take into account, inter alia, not only the amount and regularity of the income received by the citizen of the Union, but also the period during which the benefit applied for is likely to be granted to them'.⁶⁶ He then drew from the Court's case law on how a real link with the host State might be demonstrated, which 'ought to prevent automatic

⁶⁰*Alimanovic*, para. 50; citing *Dano*, para. 74. See also, recital 10 of the preamble to Directive 2004/38.

⁶¹ Cf. for example, Case C-434/09 *McCarthy*, EU:C:2011:277, para. 28: 'With regard to Directive 2004/38, the Court has already had occasion to point out that it aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by the Treaty and that it aims in particular to strengthen that right'

⁶²On this point, see e.g. S Giubboni 'Free movement of persons and European solidarity revisited' (2015) 7:3 *Perspectives on Federalism* (at http://www.on-federalism.eu/attachments/221_download.pdf) at 13.

⁶³ See e.g. Case C-20/12 *Giersch*, EU:C:2013:411, paras 47-56. See generally, J Snell 'Economic justifications and the role of the State' in Koutrakos, Nic Shuibhne and Syrpis (eds.) *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing, forthcoming 2016) 12; S Arrowsmith 'Rethinking the approach to economic justifications under the EU's free movement rules' (2015) 68 *Current Legal Problems* 307.

⁶⁴AG Wathelet in *Alimanovic*, para. 103 of the Opinion; citing *Brey*, para. 77 (emphasis added).

⁶⁵*Iliopoulou-Penot*, n15 above, 1013.

⁶⁶AG Wathelet in *Alimanovic*, para. 103 of the Opinion; citing *Brey*, paras 78-79.

exclusion from those benefits'.⁶⁷ In particular, drawing from the judgment in *Prete*, he recalled that demonstrating a real link to the labour market also includes personal factors, such as family circumstances, as well as labour market criteria, such as '[h]aving worked in the past, or even the fact of having found a new job after applying for the grant of social assistance'.⁶⁸

However, the Court provided three reasons for its decision to the contrary. First, since the Directive establishes a 'gradual system' concerning retention of the status of worker, that measure 'itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity'.⁶⁹ But that statement just makes no sense – a 'gradual system' established by legislation *cannot* take into consideration 'various factors characterising the individual situation of each applicant for social assistance'. Neither does it take into account 'the duration of the exercise of any economic activity' in each individual situation. It establishes instead a general, not individual, framework, one that is based on fixed time-points rather than more flexible qualitative criteria. The genuine confusion for national authorities caused by more qualitative guidelines does have to be acknowledged as a concern when more qualitative criteria are used, and this is returned to under the second point below. But the 'gradual system' put in place by the Directive cannot explain the softer guidance issued in consideration of the Breys – who had barely arrived in Austria from Germany when their social assistance claim was lodged. Consider, in contrast, the *Alimanovic* facts: 'all three children were born [in the host State]; the family had lived there in the past for a considerable amount of time; they returned in 2010 apparently with the intention to settle; Ms Alimanovic and her daughter had already joined the workforce in Germany, which showed that they were willing and capable of entering into an employment relationship. Such factors were not and could not be taken into account by the Directive, which focuses on "the duration of the exercise of any economic activity"'.⁷⁰ If it is time to move on from the long-established approach⁷¹ to proportionality in citizenship law – one that examines not just the appropriateness and necessity of the legal provision, but of its impact when applied in individual cases – suggesting that the same task is or even could be performed by a legislative measure adds nothing useful to that debate.

Second, the Court also emphasised in *Alimanovic* that the clarity offered by following the criteria set down in both the relevant national rules and Article 7(3)(c) of the Directive 'guarantee[s] a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while

⁶⁷AG Wathelet in *Alimanovic*, para. 107 of the Opinion.

⁶⁸AG Wathelet in *Alimanovic*, para. 111 of the Opinion; citing Case C-367/11 *Prete*, EU:C:2012:668. See similarly, his Opinion in *Garcia-Nieto*, paras 79-90. Supporting the 'distinction between first time jobseekers (who are excluded from social assistance) and jobseekers who have already lived and worked in the host society (who cannot be automatically excluded)', see Iliopoulou-Penot, n15 above, 1013-1014.

⁶⁹*Alimanovic*, para. 60.

⁷⁰Iliopoulou-Penot, n15 above, 1024, citing *Alimanovic*, para. 60.

⁷¹See further, Nic Shuibhne, n49 above, 894ff.

complying with the principle of proportionality'.⁷² As indicated just above, this rationale is far more convincing, having particular regard to the implementation of rights challenge facing national authorities. Nevertheless, a first quality of law problem, concerning the case law produced, is that, as also indicated above, the Court did not deal directly with its own previous case law – case law that had consistently pushed the individual assessment approach notwithstanding its practical weaknesses. Something changed after *Brey*; but that change has not been explained. A related risk is that, as we saw also in the discussion on direct/indirect discrimination, apparently simpler solutions cover rather than deal with the fact that the philosophy and the practice of free movement have become increasingly complicated. For example, while plainly acknowledging the difficulties and problems that fuzzier individual assessment tests do provoke, Iliopoulou-Penot equally cautions that aiming to reduce the problem through the turn that began in *Dano* but became much more overt in *Alimanovic* 'might leave a dangerous imprint on the proper functioning of a general principle, which until now seemed inherent in the judicial application of norms of constitutional status'.⁷³ However, it must also be pointed out that quality of law expectations apply to the drafting of the Directive too; and to reviewing it when some problematic ambiguities, gaps and problems are demonstrated very plainly through recurring case law instances.

Third, the Court acknowledged that 'the assistance awarded to a single applicant can scarcely be described as an "unreasonable burden" for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member State concerned under an unreasonable burden, the accumulation of all the individual claims which would be submitted to it would be bound to do so'.⁷⁴ On this point, we see a dangerous victory for presumption – 'all the individual claims which *would* be submitted to it' – in contrast to the point made in *Brey* that 'in order to *ascertain more precisely* the extent of the burden which that grant would place on the national social assistance system, it may be relevant, as the Commission argued at the hearing, to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State'.⁷⁵

The problem with presumption is that it feeds right into the tendency towards exaggeration already too dominant in debates about free movement; in *Garcia-Nieto*, even AG Wathelet remarked that 'granting entitlement to social assistance to Union citizens who are not required to have sufficient means of subsistence could result in relocation en masse liable to create an unreasonable burden on national social security systems'.⁷⁶ In contrast, O'Brien rightly calls for both the procedures and standards of proof evident more generally in free movement law to (continue to) play a part in citizenship case law too: 'while politically potent, the mere mention of public finances on its own should not close down all argument. Some actual (not abstract) threat to public finances ought to be shown, in light of the evidence that fears of EU national

⁷²*Alimanovic*, para. 61.

⁷³Iliopoulou-Penot, n15 above, 1027.

⁷⁴*Alimanovic*, para. 62.

⁷⁵*Brey*, para. 78 (emphasis added).

⁷⁶AG Wathelet in *Garcia-Nieto* (EU:C:2015:366), para. 71 of the Opinion.

benefit tourists are misplaced'.⁷⁷ Here, Iliopoulou-Penot links the more problematic 'indulgence' of the Court as regards 'the "cumulative effect" assertion in *Alimanovic*'⁷⁸ to the cryptic Commission declaration that it had been provided with 'information' showing that 'the type of exceptional situation that the proposed safeguard mechanism is intended to cover exists in the United Kingdom today' with respect to the so-called emergency brake proposed as a pre-referendum concession, returned to in Section 3.2.2 below.⁷⁹

Commission v UK illustrates another side of softened proportionality review too. It can be recalled that the Court focused not on the proportionality of the right to reside condition per se but on how it was applied.⁸⁰ From that perspective, it in turn placed considerable emphasis on the fact that verification of lawful residence was compliant in its view with Article 14(2) of the Directive; in particular, it was practised '[i]n specific cases, where there is a reasonable doubt as to whether a Union citizen or his family members satisfy the conditions' for lawful residence established by the Directive.⁸¹ The Court continued that data provided by a person claiming child benefit or child tax credit would 'reveal whether or not there is a right to reside in the United Kingdom, *those data being checked subsequently by the authorities* responsible for granting the benefit concerned. It is *only in specific cases* that claimants are *required to prove* that they in fact enjoy a right to reside lawfully in United Kingdom territory, as declared by them in the claim form'.⁸² The Court therefore concluded that checking for compliance with lawful residence was 'not carried out systematically and consequently is not contrary to the requirements of Article 14(2) of the directive'.⁸³

Dismantling that analysis as 'nonsense', Cousins responds: 'it is clear that there *is* systematic verification of the right to reside in every case—it is only the *degree* of verification which varies. Unsurprisingly, the UK authorities do not further verify a right to reside where it is clear that a claimant has such a right'.⁸⁴ O'Brien further criticises the reversal of burden of proof effected by the judgment.⁸⁵ The Court recalled

⁷⁷O'Brien, n56 above.

⁷⁸Iliopoulou-Penot, n15 above, 1027-1028.

⁷⁹ Declaration of the European Commission on the Safeguard Mechanism referred to in paragraph 2(b) of Section D of the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union, February 2016; but presenting evidence to the opposite effect, including from the Commission itself, see C O'Brien, 'Cameron's renegotiation and the burying of the balance of competencies review' at <http://ukandeu.ac.uk/camerons-renegotiation-and-the-burying-of-the-balance-of-competencies-review/>.

⁸⁰For criticism of this point of conflation, see e.g. O'Brien, n56 above: 'It is the condition, not the checks, that is the main problem, and it is the condition that must be justified once it has been shown to be discriminatory. The checks are a separate, though important issue'.

⁸¹*Commission v UK*, para. 82.

⁸²*Commission v UK*, para. 83 (emphasis added).

⁸³*Commission v UK*, para. 84.

⁸⁴Cousins, n41 above, 104 (emphasis in original).

⁸⁵O'Brien, n56 above: 'the Court decided that it was the Commission's responsibility to show that the checks were disproportionate, were not appropriate, or went beyond what was necessary. This is a problematic reversal of the burden of proof, and requires the Commission to provide information that is in possession of the UK'.

that ‘the Commission...has the task of proving the existence of the alleged infringement and of providing the Court with the evidence necessary for it to determine whether the infringement is made out’ – but continued that the Commission had ‘not provided evidence or arguments showing that such checking does not satisfy the conditions of proportionality, that it is not appropriate for securing the attainment of the objective of protecting public finances or that it goes beyond what is necessary to attain that objective’.⁸⁶ Here, the Court conflates proof of infringement with substantiation of defence. This and the morphing of justification and proportionality requirements more generally expose a series of quality of law problems in a substantive sense.

A final question concerns the consequences that might arise if it is found that a person claiming social benefits does *not* have a right to reside in the host State. None of the relevant public authorities had brought the disputes to the threshold of deportation in *Dano* or its three successor cases to date. After *Dano*, this practice raised questions about the responsibilities of States for citizens who became ‘tolerated’ in their territories but not supported there as a result.⁸⁷ In *Commission v UK*, AG Cruz Villalón indicated quite clearly the direction in which he felt such responsibility lies: ‘any finding by the national authorities that that Union citizen does not have a right of residence under that directive because he does not fulfil the requirements set out therein, regardless of whether this would carry an expulsion measure and despite the fact that it is merely declaratory, is ‘a decision [restricting] free movement of Union citizens’ within the meaning of Article 15(1) of that directive, which, as laid down in that provision, has the effect of activating the guarantees provided for in Articles 30 and 31 thereof’.⁸⁸ If findings on lawful residence are required to be formalised in all cases in this way, how many, in reality, would not proceed to the next step of an expulsion measure? After all, if the administrative machinery of the State is engaged already, continuing down the trajectory does not seem as burdensome as having stopped at refusing the benefit in the first place. Perhaps then we are entering a phase of tolerance no more, which may be a fairer reflection and consequence of how citizenship *law* has developed – but maybe it is also fair to say that it does not seem very much like *citizenship* as a result.

3.2 Directive 2004/38 and the relationship between Articles 18, 21 and 45 TFEU

The super-norm status conferred on Directive 2004/38 – and especially on the conditions set down in Article 7, given that most national rules challenged to date restricted entitlement to social assistance and/or social benefits concern persons who are not engaged in work or self-employed – also raises tricky questions about the relationship between the rights conferred on citizens by Articles 18, 21 and 45 TFEU, and of the different legislative measures adopted to give effect to these (different?) sets of primary rights. Three ways of conceiving that relationship might be relevant: the

⁸⁶*Commission v UK*, para. 85.

⁸⁷Nic Shuibhne, n49 above, 916, 926-927 and 933-934. See also, D Thym, ‘When Union citizens turn into illegal migrants: the *Dano* case’ (2015) 40:2 ELRev 249.

⁸⁸AG Cruz Villalón in *Commission v UK*, para. 95 of the Opinion.

original, *parallel* view on specific expression; the consequences of *hybrid* status; and a newer sense of specific expression *superseded*.

First, the original view on specific expression refers to the idea that freedom of movement for workers in Article 45 TFEU was deemed to be a specific expression of the right to reside and move freely conferred on citizens more generally by Article 21 TFEU. The principal consequence was that situations that fell within the scope of Article 45 were to be examined against that provision in the first instance, with consideration of Article 21 being necessary only if the case could not be resolved on that basis.⁸⁹ This view suggested that Article 21 TFEU was a residual provision, called into being only when the economic freedoms were not otherwise triggered.

However, second, in the case law on benefits payable to jobseekers, the Court fused the Treaty provisions together to construct ‘the hybrid system described in *Collins*’⁹⁰ i.e. ‘[i]n view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 4[5](2) [TFEU] – which expresses the fundamental principle of equal treatment, guaranteed by Article [18 TFEU] – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State’.⁹¹ Here, in contrast to the residual approach, Article 21 TFEU is blended with Article 45; freedom of movement of workers is infused with a legal added value extracted from free movement as a citizenship right, to enhance the scope of equal treatment. Importantly, what results could not have been achieved by using either provision alone.

But it is now arguable that, third, post *Dano*, the limitations signalled in Article 21 TFEU – which are laid down not just in the Treaties but also ‘by measures adopted to give them effect – supersede other specific expressions of free movement rights. In what follows, the implications of this shift are first demonstrated through discussion of the interplay of secondary legislation as concerns the nature of the benefit at issue in recent case law. The implications of that reasoning for the rights of jobseekers and for the rights of migrant workers are then considered.

3.2.1 *The nature of the benefit*

The Court did have a classification question in *Alimanovic*, since it needed to determine what, more precisely, constituted a benefit intended to facilitate access to employment in a host State’s labour market. In his Opinion, it seems clear that AG Ruiz-Jarabo Colomer envisaged an inclusive interpretation: ‘the objective of the assistance must be analysed *according to its results* rather than according to the formal structure of the benefit...there may be ‘social assistance’ measures, as contemplated in Article 24(2) of Directive 2004/38, which promote integration into the labour market. In those circumstances, Collins demands that Article [45 TFEU] be applied and that social assistance be granted to persons seeking employment within the territory of the

⁸⁹See e.g. Case C-104/06 *Commission v Sweden*, EU:C:2007:40, paras 15-16. See similarly, for services, Case C-76/05 *Schwarz and Gootjes-Schwarz*, EU:C:2007:492, para. 34.

⁹⁰AG Ruiz-Jarabo Colomer in *Vatsouras and Koupatantze* (EU:C:2009:150), para. 34 of the Opinion.

⁹¹Case C-138/02 *Collins*, EU:C:2004:172, para. 63.

Union’.⁹² The Court explicitly referred to his analysis in its judgment, confirming that ‘the objective of the benefit must be analysed according to its results and not according to its formal structure’.⁹³ It noted too that national authorities should ‘not only...establish the existence of a real link with the labour market, but also to assess the constituent elements of that benefit, in particular its purposes and the conditions subject to which it is granted’.⁹⁴

At the level of fact, financial assistance towards basic provision or housing has the ‘result’ of facilitating access to the labour market. Of course it does. In *Alimanovic*, AG Wathelet acknowledged the ‘possibly mixed nature of the benefit on the classification of the measure (that is to say, the case in which the benefit in question possesses both features relating to social assistance and features relating to integration into the labour market)’.⁹⁵ However, we saw in Section 2.1 that the Court ultimately followed his ‘predominant function’ method, which results in a more restrictive outcome when coupled with the *Brey* functional definition of social assistance. The nature of benefit question in *Alimanovic* thus involved a choice at the level of interpretation of concepts. What complicated the picture much further in *Commission v UK* concerns the codification of choices in secondary legislation. As noted in Section 2.3, one problem links back to how *Alimanovic/Garcia-Nieto* reasoning on social assistance benefits was transposed to social security benefits without comment or explanation. To compound that problem, questions about determining the nature of the benefit at issue exposed an ambiguity about how different pieces of secondary legislation work together.

In his Opinion, AG Cruz Villalón, having acknowledged that the purpose of Regulation 883/2004 ‘is to coordinate Member States’ social security systems in order to guarantee that the right to free movement of persons may be exercised effectively’ went on to state that the Regulation ‘lays down a series of common principles which the social security legislation of all the Member States must observe and which, together with the system of conflict of laws rules it contains, ensure that persons exercising their right to free movement and residence within the Union will not be adversely treated by the various national systems because they have exercised that right. One of those common principles is the principle of equal treatment under Article 4 of Regulation No 883/2004 which, for the specific area of social security, embodies the prohibition of discrimination on grounds of nationality which is applicable to all EU law under Article 18 TFEU’.⁹⁶ He also acknowledged that ‘whilst Directive 2004/38 takes account of the need to have recourse to social assistance benefits in the context of the lawfulness of residence, it is silent regarding social security benefits such as those at issue in this case’.⁹⁷ That part of the analysis accorded with the submissions of the Commission.

However, the turn of argument then pursued changed the resolution of the dispute completely, and the reasoning applied could have implications far beyond the

⁹²AG Ruiz-Jarabo Colomer in *Vatsouras and Koupatantze*, para. 57 of the Opinion (emphasis in original).

⁹³*Vatsouras and Koupatantze*, para 42.

⁹⁴*Vatsouras and Koupatantze*, para 41.

⁹⁵AG Wathelet in *Alimanovic*, para. 53 of the Opinion.

⁹⁶AG Cruz-Villalón in *Commission v UK*, para. 49 of the Opinion (emphasis added).

⁹⁷AG Cruz-Villalón in *Commission v UK*, para. 64 of the Opinion.

specifics of this case. The steps in the legal argument are critical. The Advocate General first stated that Article 18(1) TFEU prohibits discrimination on the grounds of nationality '[w]ithin the scope of application of the Treaties and without prejudice to any special provisions contained therein'; next, he pointed to the 'measures adopted to give them effect' part of Article 21(1). For the avoidance of any doubt, he referred also to the 'limited nature' of the freedom to move and reside as a Charter right, since, '[i]n accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties'.⁹⁸ From a general starting point that 'the EU legal order could hardly consist of a multiplicity of entirely separate compartments', special emphasis was then placed on the fact that Directive 2004/38 had been adopted '[w]ith a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right' (recital 4). Extrapolating a claim to legal hierarchy for the Directive on that basis, he concluded: 'I cannot agree with the Commission's assertion that "the concept of residence in Regulation No 883/2004 ... is not subject to any legal *preconditions*" ... [If] EU law subjects the exercise of freedom of movement and residence to certain limitations and conditions, *embodied in particular* in Directive 2004/38, it seems clear that *the provisions of Regulation No 883/2004 cannot be interpreted in such a way as to neutralise the conditions and limitations* accompanying the grant and proclamation of that freedom'.⁹⁹

The idea of the Directive's limitations and conditions setting *preconditions* – over and above any other legislative provisions connected to free movement – is a critical interpretative step. The prohibition on discrimination expressed in Article 4 of the Regulation is sidelined as the expression of a 'common principle' that is 'applicable to all EU law under Article 18 TFEU'. Directive 2004/38 is confirmed all the more as the beginning and end of citizenship rights: as Spaventa puts it, their floor *and* their ceiling.¹⁰⁰ Then noting variable references to 'social benefits' and 'social assistance' in *Brey*, *Dano* and *Alimanovic*,¹⁰¹ the Advocate General can conclude that 'there is nothing in those judgments to indicate that such findings apply exclusively to the social assistance benefits or the special non-contributory cash benefits with which those cases were concerned and not to other social benefits'.¹⁰²

We saw in Section 2.3 that the Court's treatment of these questions was far briefer but also apparently different. It emphasised more the coordination objective of the Regulation than the consolidation objective of the Directive. But the endpoint was the same: 'there is nothing to prevent, in principle, the grant of social benefits to Union

⁹⁸AG Cruz-Villalón in *Commission v UK*, para. 69 of the Opinion.

⁹⁹AG Cruz-Villalón in *Commission v UK*, paras 72 and 73 of the Opinion (emphasis added); see similarly, para. 77: 'any difference in treatment between UK nationals and nationals of other Member States occurs at a stage before that of the practical application of Article 4 of Regulation No 883/2004, and does not therefore affect its applicability in principle'.

¹⁰⁰ E Spaventa 'Citizenship: reallocating welfare responsibilities to the State of origin' in Koutrakos, Nic Shuibhne and Syrpis (eds.), n64 above, 32 at 42. Similarly, Jacqueson describes the Directive as the 'backbone of Union citizenship' ('Back to business – the Court in *Alimanovic*' at <http://beucitizen.eu/back-to-business-the-court-in-alimanovic/>).

¹⁰¹See further on this point, H Verschuere 'Free movement of EU citizens: including for the poor?' (2015) 22:1 MJ 10 at 28.

¹⁰²AG Cruz-Villalón in *Commission v UK*, para. 74 of the Opinion.

citizens who are not economically active being made subject to the requirement that those citizens fulfil the conditions for possessing a right to reside lawfully in the host Member State'.¹⁰³ This interpretation diminishes the Regulation at one level, since it enabled the strapping on of a lawful residence test from the Directive to the habitual residence test in the Regulation – even if the Court treated the two regulatory spaces as simply *different*. However, in contrast to the 'precondition' reasoning applied by the Advocate General, the Court did not displace the prohibition on discrimination captured by Article 4 of the Regulation. Instead, it acknowledged an indirectly restrictive breach of it. But here, it did accept the Directive's expression of lawful residence conditions as a justifiable in principle discriminatory limit on the Regulation's operation, leading O'Brien to note the irony that claimants 'might only gain protection from discrimination if they have already passed a discriminatory test'.¹⁰⁴ Both the Opinion and the judgment therefore affirm the super-norm reach of the Directive and, more specifically, its Article 7 conditions on lawful residence. Also, it may be recalled that the Court had ruled in *Dano* that 'whilst Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, Article 24(2) of that *directive* contains a derogation from the principle of non-discrimination'.¹⁰⁵ However, that different interpretative approaches were applied to arrive at the same endpoint may yet have considerable implications, as restrictions on equal treatment move further into the formerly sacred space of economic activity.

3.2.2 *Implications for the free movement of workers*

Through almost but not quite enough duration of economic activity, the circumstances in *Alimanovic* represented a difficult middle ground between citizens who are not, or not yet, economically active and citizens who do meet the definition of worker under EU law.¹⁰⁶ However, that definition is widely acknowledged to set a low threshold of contribution to the host State in contrast with the high threshold of equal treatment then triggered. The Court did not consider whether Ms Alimanovic or her eldest daughter might have rights under Article 45 TFEU directly.¹⁰⁷ It had determined in *Saint Prix* that the criteria listed in Article 7(3) for the retention of worker status are not exhaustive, enabling it to secure continuity of worker status for a woman who stopped work for pregnancy and childbirth.¹⁰⁸ While greater consistency of approach to the role of primary rights is needed, it was perhaps easier for the Court to extract protection directly from Article 45 TFEU for a criterion not contemplated at all by the Directive than for the criteria that *are* included there for former workers. It is perhaps

¹⁰³*Commission v UK*, para. 68.

¹⁰⁴O'Brien, n56 above.

¹⁰⁵*Dano*, para. 64 (emphasis added).

¹⁰⁶E.g. Case C-46/12 *N*, EU:C:2013:97, paras 40 and 42 i.e. a person performing 'services for and under the direction of another person, in return for which he receives remuneration' and pursuing 'effective and genuine activities which are not on such a small scale as to be regarded as purely marginal and ancillary'.

¹⁰⁷See e.g. Iliopoulou-Penot, n15 above, 1018.

¹⁰⁸Case C-507/12 *Saint Prix*, EU:C:2014:2007, paras 35-40.

also worth considering the sting in the *Saint Prix* judgment tail: where a former worker has been employed in a host State for more than one year, entitlement to social assistance on the premise of equal treatment with nationals of that State seems to be open-ended; but in *Saint Prix*, the Court attached a condition about returning to work ‘within a reasonable period’.¹⁰⁹ Perhaps that dimension of Article 45 TFEU could yet influence the interpretation of Article 7(3) of the Directive too.

To date, equal treatment for migrant workers as regards entitlement to social benefits rests on Article 7(2) of Regulation 492/2011, which provides that a worker from another State ‘shall enjoy the same social and tax advantages as national workers’. Additionally, the Court has interpreted ‘social and tax advantages’ very broadly: ‘in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment’.¹¹⁰ The Court also confirmed that so long as its threshold definition of work was reached, the worker was then entitled to social assistance on the same basis as nationals of the host State.¹¹¹ Jobseekers were originally deemed not to come within the scope of Article 7(2) of the Regulation.¹¹² However, despite the ‘objective difference’ between workers and those seeking work,¹¹³ we saw that *Collins* created a ‘hybrid system’ whereby, through the coupling of Articles 21 and 45 TFEU, ‘[t]he interpretation of the scope of the principle of equal treatment in relation to access to employment must reflect this development, as compared with the interpretation followed in *Lebon*’.¹¹⁴ Moreover, the Court went on to refer to the jobseekers allowance at issue in *Collins* as a social advantage under Article 7(2) of the Regulation.¹¹⁵

But if the recent case law considered in this comment has moved us beyond original specific expression and hybrid analyses of the relationship between Articles 18, 21 and 45 TFEU, towards a superseding of Treaty rights and also of conditions expressed in legislation other than Directive 2004/38, could this have implications for citizens who *are* working or self-employed in a host State? In the context of examining economic justifications for free movement restrictions, Spaventa outlines the basic logic that has long protected equal treatment for migrant workers: ‘EU economic migrants might draw on host State welfare provision, but they also pay into it through general and ad hoc contribution. It is for this reason that economic justifications cannot be relied upon in the internal market: protectionism is to be eradicated, not

¹⁰⁹*Saint Prix*, para. 41.

¹¹⁰Case 32/75 *Cristini*, ECLI:EU:C:1975:120, paras 12-13.

¹¹¹ Case 139/85 *Kempf*, EU:C:1986:223, para. 14: ‘a person in effective and genuine part-time employment cannot be excluded from their sphere of application merely because the remuneration he derives from it is below the level of the minimum means of subsistence and he seeks to supplement it by other lawful means of subsistence. [It] is irrelevant whether those supplementary means of subsistence are derived from property or from the employment of a member of his family...or whether...they are obtained from financial assistance drawn from the public funds of the Member State in which he resides’.

¹¹² Case 316/85 *Lebon*, EU:C:1987:302, para. 26.

¹¹³AG Wathelet in *Garcia-Nieto*, para. 76 of the Opinion.

¹¹⁴*Collins*, para. 64.

¹¹⁵*Collins*, para. 67.

encouraged'.¹¹⁶ She also expresses the converse implication: that the conditions requiring citizens not pursuing economic activity to be self-sufficient in order to reside lawfully in the host State are therefore legitimate, as are the economic considerations underpinning them.

Thus it is not that workers do not have to meet the condition of lawful residence in the host State at all; but that working there satisfies it because Article 7(1)(a) of the Directive does not place any requirement of self-sufficiency on workers. In reality, though, the Court's approach to economic justifications has, as acknowledged by Spaventa, become far more fragile. As Davies explains, '[t]he assumption that those in employment are self-sufficient is not reflected in many European societies, where significant parts of the labour force may rely on support varying from subsidized housing and medical care to tax breaks and income top-ups'.¹¹⁷ The Court has itself moved towards more explicit articulation of the qualitative as well as functional integration link that work provides to the host State in the context of equal treatment claims. In this trend, Giubboni identifies seeds of 'an interpretative reorientation, or detour' that could if consolidated further 'undermine...the unconditional right for migrant workers to have access to all the social benefits guaranteed by the host country'.¹¹⁸ Two examples allow us to test how and to what extent recent case law might reach into equal treatment for migrant workers: first, the limitation in Article 24(2) of the Directive that no social assistance is payable during the first three months of residence; second, the phased entitlement to in-work benefits proposed as part of the political settlement for UK membership of the EU negotiated in February 2016.

On the first example, there is a presumption in the case law that the exclusion of entitlement to social assistance during the first three months of residence does not apply to workers. In *Garcia-Nieto*, the Court stated that 'it follows from the *express wording* of [Article 24(2) of Directive 2004/38] that the host Member State may refuse to grant persons *other than workers, self-employed persons* or those who retain that status any social assistance during the first three months of residence'.¹¹⁹ But there is no such 'express wording' in that provision. In accordance with Article 24(1), workers do reside lawfully in a host State 'on the basis of this Directive' simply because they are workers; that does not explain why the clear and unconditional derogation from equal treatment in Article 24(2) – that 'the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence' – should not then apply to them.

Turning to the second example, it was noted earlier that the February 2016 Conclusions included a proposed amendment to Regulation 492/2011 in the form of an emergency brake, outlined as 'an alert and safeguard mechanism that responds to situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time':

¹¹⁶Spaventa, n101 above, 34.

¹¹⁷ G Davies 'Migrant Union citizens and social assistance: trying to be reasonable about self-sufficiency' College of Europe Research Papers in Law 2/2016, at <https://www.coleurope.eu/study/european-legal-studies/research-publications>, 5.

¹¹⁸See Giubboni, n63 above, 15; discussing e.g. *Giersch*, para. 65.

¹¹⁹*Garcia-Nieto*, para. 44 (emphasis added).

A Member State...would notify the Commission and the Council that such an exceptional situation exists on a scale that affects essential aspects of its social security system, including the primary purpose of its in-work benefits system, or which leads to difficulties which are serious and liable to persist in its employment market or are putting an excessive pressure on the proper functioning of its public services. On a proposal from the Commission after having examined the notification and the reasons stated therein, the Council could authorise the Member State concerned to restrict access to non-contributory in-work benefits to the extent necessary. The Council would authorise that Member State to limit the access of newly arriving EU workers to non-contributory in-work benefits for a total period of up to four years from the commencement of employment. The limitation should be graduated, from an initial complete exclusion but gradually increasing access to such benefits to take account of the growing connection of the worker with the labour market of the host Member State.¹²⁰

Had this Decision come into effect, and the proposed amendment to Regulation 492/2011 proceeded in the directly discriminatory language in which it was framed ('EU workers'), then noting the Court's reluctance to deal with public interest justification and direct discrimination in *Commission v UK*, the revised legislation was unlikely to have survived legal challenge. However, had the amendments been drafted more neutrally (i.e. based on residence), the nature of the legal problem changes. How, in that case, would the relationship between Articles 18, 21 and 45 TFEU, and between Directive 2004/38 and Regulation 492/2011, be managed?

Noting the clear transposition of economic justification to situations involving economic activity in the text of the Decision, refusal to listen to that public interest defence would have been one striking outcome. But observing how the public finance narrative has intensified towards State interests over time, as outlined in Section 3.1.1, makes that unlikely. This brings us back to the distinction between the ascendancy conferred on Directive 2004/38 in recent case law, on the one hand, and *how* it was conferred, on the other. The originally protective status that the specific expression and hybrid interpretations wrapped around Article 45 TFEU (and Regulation 492/2011 in consequence) no longer seem sufficiently sturdy to withstand the kind of system envisaged by the 2016 Decision. But how far could the superseding of free movement of workers by the Directive actually be taken?

At the very least, it seems strange that the Decision did not explicitly require an amendment of Article 24(2) of the Directive at least, if not some alteration of Article 7(1)(a) also. Assuming that the EU legislature did in fact intend to amend Article 24(2), would that be the end of the matter? Here is where the differing approaches of the Advocate General and Court in *Commission v UK* could make a critical legal difference. If the logic of the Opinion were followed, then Directive 2004/38 would simply displace Articles 18 and 45 TFEU as a *more* specific expression of equal treatment. An appropriate amendment to the Directive's text would then be the end of the matter,

¹²⁰See note XXX above. It was noted that '[t]he authorisation would have a limited duration and apply to EU workers newly arriving during a period of 7 years'.

subject to checks on proportionality – and even then, not entirely rigorous checks if the weak requirements on evidence and proof evident in *Commission v UK* were followed.

However, in that case, the Court admitted consideration of the right to reside test in the first place since the Regulation was ‘not intended to lay down the conditions creating the right to social security benefits’ (para. 65).¹²¹ Regulation 492/2011 patently *is* intended to lay down the conditions for equal treatment of workers. Does that change its relationship to Directive 2004/38, restoring the more conventional ‘specific expression’ route for examining any proposed amendments of the Regulation i.e. against Articles 18 and 45 TFEU directly? But opening up the link between equal treatment and economic activity would still have tested both the limits of and philosophy underpinning what, post *Dano*, the Court has told us three more times is true – to claim equal treatment rights, lawful residence needs to be established only in accordance with what Directive 2004/38 says that lawful residence means. If some form of self-sufficiency requirement for workers and self-employed persons were included in Article 7 of that measure, then it could displace Article 7 of Regulation 492/2011.

Events have since overtaken the February 2016 Decision. But the problems – and the pressures – remain. Let us not forget that the UK initiating a discussion about limiting the free movement of workers is not really the key point; rather, it is that 27 other States wanted – or, at least, were ready – to do it.

4. Conclusion

The decisions in *Alimanovic*, *Garcia-Nieto* and *Commission v UK* do create a consistent line of jurisprudence with *Dano*, confirming the main premises of that judgment and also expanding them through application in different contexts. But then, the weaknesses of *Dano* from a quality of law perspective are compounded in consequence too. Commentary continues to question what *kind* of citizenship law is being shaped as a result.¹²² This comment does not seek to argue that a connection between lawful residence and equal treatment is per se unacceptable. But how that connection has been developed and applied does matter. In that respect, critiques of the part played by the Court persist – but even where the restrictive case law on lawful residence and social benefits is appreciated in the fraught context of crisis-ridden welfare politics, what remains more difficult to condone is the extent of the distortion of quality of law – of legal methodology and of systemic coherence – that has been practised reach these case law outcomes. Quality of case law is also intrinsically tied to quality of the

¹²¹However, for criticism of that finding too, see O’Brien, n56 above.

¹²²E.g. examining the disconnect between citizenship and the wider EU objectives of combating poverty and social exclusion, see Verschueren, n102 above; on the particular implications of the case law for children, see O’Brien, n56 above. Challenging these positions to some extent, see U Neergaard ‘Europe and the welfare state-friends, foes, or...?’ (2016) YEL 1.

legislation that underpins it: legislative responsibility to regulate free movement *well* is not being fulfilled.¹²³

How mobility is experienced has long outgrown basic constructs developed for life at a very different time and in a very different world. The appealing simplicity of the framework of equal treatment law undoubtedly contributed to its rooting in the legal and political systems of Member States. But how we exercise free movement and how we define discrimination have changed entirely since the European Economic Community was conceived. People lead more complicated cross-border lives, while the legal components of equal treatment and free movement have barely changed. The minimalist framework of free movement law compresses legal nuances, mashes distinct concerns together, and generates blunt legal solutions to very different practical problems. The law and legal institutions have become too remote from the facts on the ground. And the inherent connections between equal treatment in free movement and the 'European project' then become toxic, disaffection with the former inevitably bleeding into the latter.

In the 2016 negotiations, the UK Government presented the objective of 'renegotiating' free movement from a destructive starting point that sought the dismantling of rights in order to reduce them, and with no regard to the wider system of EU law or its role in grounding the Union. By contrast, let us invert the premises of the UK challenge into a constructive rethinking of equal treatment and free movement law – not to reduce rights, but to strengthen them. For now, recent case law on lawful residence exhibits the surprising extent to which what we might consider to be basic EU law – how legislative measures interact with each other, for example – is far less worked out than we thought it was, in EU citizenship law at least.

¹²³See further, Davies, n118 above, esp. 25-26.